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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 01 220 53228 Office: TEXAS SERVICE CENTER Date: JUN 18 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner is described as a manufacturer and seller of cast aluminum patio furniture. It seeks to extend its authority to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that (1) the foreign entity has been doing business for the past year; and (2) the beneficiary had been and would continue to be employed primarily in a managerial or executive capacity with the U.S. entity.

On appeal, the petitioner disagrees with the director's determination and asserts that the foreign entity has been doing business since the beneficiary's stay in the United States, and that the beneficiary's duties have been and will continue to be primarily managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves

in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

E) Evidence of the financial status of the United States operation.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1999 as a manufacturer and seller of cast aluminum patio furniture. The petitioner claims that the U.S. entity is a subsidiary of North's Garden Furniture, (Pty)Ltd, located in Cape Town, South Africa. The petitioner declares two employees. The petitioner seeks to extend the beneficiary's services as general manager for a period of two years, at a yearly salary of $60,000.

In the instant matter, the record shows that a petition to extend the beneficiary's stay in the United States was filed on August 15, 2001. The record also shows that the director filed a Request for Evidence on September 20, 2001. The record demonstrates that the petitioner submitted a response to the director's request for evidence on November 23, 2001. The record reflects that a decision to deny the petition was issued by the director on January 31, 2002 and ultimately returned by the U.S. Postal Service as undeliverable. On June 17, 2002, the petitioner stated that it had not received the director's decision and submitted a Freedom of Information Act (FOIA) request accordingly. Citizenship and Information Services (CIS) responded to the petitioner's FOIA request by faxing a copy of the petition and the director's decision to the petitioner on July 17, 2002. Although the fax cover sheet used to fax a copy of the petition and director's decision read "Fax Request for Additional Evidence," there in nothing in the record that shows that the officer who rendered the decision requested additional evidence, after the issuance of the decision. Therefore, the evidence submitted by the petitioner on appeal will be viewed according to the regulations (8 C.F.R. § 103.2(b)(8) and 8 C.F.R. § 103.2(b)(12)) and pertinent case law.

The first issue in this proceeding is whether the foreign entity has been doing business and will continue to do business as defined in the regulations.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the instant matter, the director requested additional evidence from the petitioner relating to the claim that the foreign entity has been doing business for the past year. The director specifically stated:

Please submit evidence that the foreign company has been doing business for the prior year. Evidence may include copies of corporate income tax returns, accountant statements, invoices, bills of sale, bills of lading, shipping receipts, etc.

In response to the director's request for additional evidence, the petitioner submitted copies of the foreign entity's Articles of Association, Certificate of Incorporation, resume of company history, lease agreement, company invoices dated 1995 through 1999, promotional materials, and an independent auditor's report dated April 30, 1999.

The director determined that the petitioner had not submitted sufficient evidence to establish that that the foreign entity continuously and systematically engaged in the provision of goods and services during the year preceding the filing of the petition. The director stated that there was no evidence of record that indicated that the foreign entity had conducted business from October 1999 to July 2001.

On appeal, the petitioner disagrees with the director's decision and states that it has submitted sufficient evidence to establish that the foreign entity has been and will continue to do business in a regular, systematic, and continuous manner. The petitioner submits copies of tax invoices and financial statements as proof of the foreign entity's doing business.

In review of the record, the petitioner has not submitted sufficient evidence to show that the foreign entity has been doing business for the year preceding the filing of the instant petition. After the director requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, the

petitioner relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted copies of tax invoices and a financial statement. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). CIS cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981).

Pursuant to 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the foreign entity has been doing business for the year preceding the filing of the instant petition. There is no evidence of record pertaining to business tax records, sales invoices, accounting statements, or other business records. The petitioner has failed to establish that the foreign entity has remained a viable business entity, thus bringing into question the U.S. entity's ability to continue to qualify as an organization doing business in the United States, and at least one other country, during the requested period of approval on behalf of the beneficiary. The petitioner has failed to overcome the objections of the director. There is insufficient evidence to demonstrate that the foreign entity continues to be systematically engaged in the provision of goods and or services.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily—
>
> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of

the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily—
>
> (i) Directs the management of the organization or a major component or function of the organization;
>
> (ii) Establishes the goals and policies of the organization, component, or function;
>
> (iii) Exercises wide latitude in discretionary decision-making; and
>
> (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In response to the director's request for additional evidence regarding the beneficiary's past and proposed duties, the petitioner stated that the U.S. entity employed the beneficiary as general manager and one trainee powder coater. The petitioner listed the beneficiary's job duties as:

DAILY DUTIES – INITIAL PHASE

a. Supervision and training of powder coating staff – 30%
b. Set up and supervision of sales reps/customers – 40%
c. Admin and liaise with parent plant in SA – 10%
d. Infrastructure set up general-suppliers, freight handlers – 10%
e. Design, local and international – 10%

DAILY DUTIES-SECOND PHASE

a. Supervision of powder coating staff-10%
b. Employment and training of dispatch staff-20%
c. Employment and training of sales manager-20%
d. Employment and training of admin manager-20%
e. Supervision of sales reps/customers-10%
f. Admin and liaise with parent plant in SA-10%
g. Design, local and international-10%

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director stated that the evidence failed to show that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing the non-qualifying duties. The director further maintained that the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business. The director stated that the beneficiary could not be said to be engaged in primarily managerial duties a preponderance of the time. The director also stated that the

evidence demonstrated that the U.S. entity employed only two individuals. The director further stated that the petitioner had not established that the beneficiary would primarily manage an essential function within the organization, or that the entity had developed to a point where it was in a position to support a full-time manager or executive.

On appeal, the petitioner disagrees with the director's decision. The petitioner submits a copy of the U.S. entity's organizational chart and an explanation of the beneficiary's duties.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. After the director requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, the petitioner relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner's submits a copy of the company's organization chart. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra.* Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: set up and manage all aspects of the U.S. entity, establish the goals and the policies of the organization, and provide guidance to both the U.S. and foreign entities. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. V. Sava,* 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd,* 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id. at 1108.*

The petitioner has not demonstrated that the beneficiary has been or will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve her from performing non-qualifying duties. The petitioner claims that it employs a powder coater. However, there has been no evidence submitted by the petitioner to show whether the powder coater is employed on a full-time or part-time basis; neither is there evidence of record to establish to what extent he takes directions from the beneficiary in performing his duties. Furthermore, evidence of record demonstrates that over 60 percent of the beneficiary's time will be spent training non-professional staff who have yet to be hired by the petitioner.

The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. The record indicates that primarily the beneficiary's duties have and will consist of maintaining the business operations rather than managing the same. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the functions of the U.S. entity rather than managing a function of the organization. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International,* 19 I&N Dec. 593, 604(Comm.1988). The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Finally, the petitioner contends that the beneficiary possesses specialized knowledge of the foreign entity's operations and procedures, in that he has acquired specialized knowledge through his management of the foreign and U.S. entities. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). If the petitioner believed that the beneficiary was eligible for this nonimmigrant visa classification as an employee who possessed specialized knowledge, the petitioner was required to request such classification when filing the petition. *See Matter of Michelin Tire Corp., supra.* There are no statutory or regulatory provisions that allow a petitioner to select alternative classifications within a single petition. The AAO notes that, if the petitioner wishes to seek classification of the beneficiary as an L-1B intracompany transferee, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Beyond the decision of the director, the petitioner has not provided sufficient evidence of the financial status of the United States operation, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). In a request for evidence, the director requested copies of the petitioner's 2000 Internal Revenue Service (IRS) Form 1120, corporate tax returns, to establish the financial status of the U.S. operation and to show that the petitioner is doing business. In response, the petitioner stated that it did not have a 2000 IRS Form 1120 because it began conducting business January 1, 2001. No evidence was submitted in support of this statement. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For these additional reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.